

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of

Framework for Broadband Internet
Service

GN Docket No. 10-127

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA**

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July 15, 2010

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The California Public Utilities Commission and the People of the State of California (“CPUC” or “California”) respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Inquiry (“NOI”) released June 17, 2010.¹

The CPUC’s interest in this proceeding derives from its statutory and constitutional role as a state consumer protection agency. The CPUC is acutely mindful of California’s place as “home to some of the greatest technology companies in the world,” as Governor Arnold Schwarzenegger stated in a recent letter to Commission Chairman Genachowski.² Governor Schwarzenegger pointed out that California has “taken the lead in putting the promise of broadband technology to use in critical areas like energy, medicine and education.” California realizes that the Commission is not proposing to regulate the Internet.³ Accordingly, these comments on behalf of the CPUC are intended to underscore California’s support for the principles of a free and open Internet, and our interest in “maintaining that openness while encouraging the massive private investment necessary to expand the availability and adoption of broadband service across our nation.”⁴ The CPUC supports this effort by the Commission to balance these important goals.

¹ Notice of Inquiry, *In the Matter of the Framework for Broadband Internet Service*, GN Docket 10 127, rel. June 17, 2010.

² Letter from California Governor Arnold Schwarzenegger to FCC Chairman Julius Genachowski.

³ *Id.*

⁴ One of the options the Commission is considering would apply limited Title II jurisdiction⁴ over the transmission element of Internet access, while refraining from regulating the Internet.

I. INTRODUCTION

A. Background

The FCC seeks comments on its “legal framework for broadband Internet service.”⁵ The Commission invites comments on three specific approaches.⁶ First, the Commission asks “whether information service classifications of broadband Internet service remains adequate to support effective performance of Commission responsibilities.”⁷ Next, the Commission solicits “comment on the legal and practical consequences of classifying Internet connectivity service as a telecommunication service to which all the requirements of Title II of the Communications Act would apply.”⁸ Finally, the Commission invites “comment on a third way under which the Commission would forbear under § 10 of the Communications Act⁹ from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support.”¹⁰

The FCC has initiated several rulemakings to implement the National Broadband Plan (“Plan”), released on March 16, 2010. The Plan fulfilled the Commission’s

⁵ *Comment Sought on Transition from Circuit-Switched Network to All-IP Network*, NBP Public Notice # 25, GN Docket Nos. 09-47, 09-51, 09-137, rel. December 1, 2009 (NOI), p. 2.

⁶ NOI, para. 2.

⁷ *Id.*

⁸ *Id.*

⁹ 47 U.S.C. Sec. 160.

¹⁰ NOI, para. 2.

congressional mandate to develop a plan that sets forth expansive goals such as delivering affordable next-generation broadband to 100 million households throughout the United States by 2020, and revising universal service subsidies by setting forth a pathway to achieving universal availability of broadband at high speeds.

Specifically, the Plan designs policies to ensure robust competition, innovation and investment through efficient allocation and management of assets such as spectrum, poles, and rights-of-way to encourage network upgrades and competitive entry. Further, the Plan also envisions reform of current universal service mechanisms to support deployment of broadband in high-cost areas and to ensure that broadband is affordable to low-income Americans. The Plan also encourages adoption of new laws and revision of existing laws so that an effective statutory construct can be utilized to promote policies, standards and incentives that will maximize the benefits of broadband in public education, health care, and government operations.¹¹

Further, in its recent *Open Internet* Notice of Proposed Rulemaking,¹² the Commission noted that it has considered the issue of Internet openness in many contexts and proceedings, including “a unanimous policy statement, a notice of inquiry on broadband industry practices, public comment on several petitions for rulemaking, [and] conditions associated with significant communications industry mergers.”¹³

¹¹ *Id.*

¹² *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC 07-52, rel. October 22, 2009.

¹³ *Id.* at para. 2.

In the past decade, the FCC has relied primarily on Title I of the Telecommunications Act (Title I) for its jurisdictional authority over broadband services. On April 6, 2010, however, in *Comcast v. FCC*, the United States Court of Appeals for the District of Columbia Circuit rejected the FCC's approach in connection with its 2008 order.¹⁴ Specifically, the Court held that the Commission had failed to make the requisite showing that enforcement of the policies in its *Internet Policy Statement* was "reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities."¹⁵ In particular, the Court found that the FCC had failed to "link the cited policies to express delegations of regulatory authority."¹⁶ The FCC responded by issuing this NOI on June 17, 2010.

B. Future Applicability of Title I

In its 2002 *Cable Modem Order*, the Commission found that Title I jurisdiction over broadband Internet access service was based on that service being classified as an "information service."¹⁷ In reviewing the *Cable Modem Order*, the U.S. Supreme Court,

¹⁴ *Comcast v. FCC*, D.C. Circuit Appeal 08-1291 (available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>) ("Slip Opinion"), vacating the Commission's Memorandum Opinion and Order in *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Application*, 23 FCC Rcd. 13028 (2008), in which the FCC enforced its 2005 *Internet Policy Statement*.

¹⁵ Slip Opinion, at 3, quoting *Am. Library Ass'n v. FCC*, 406 F3d 689, 692 (D.C. Cir. 2005).

¹⁶ Slip Opinion, at 24.

¹⁷ *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, FCC No.02-77, 17 FCC Rcd 4798, 4870 (2002) (*Cable Modem Order*), *aff'd sub nom. National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*").

giving so-called *Chevron* deference to the Commission,¹⁸ concluded that the FCC had acted within its discretionary authority in classifying broadband Internet access service.¹⁹

After the recent *Comcast* decision, and in recent comments on the *Open Internet* NPRM, the CPUC explained that “[a]fter reviewing all of the comments, relevant case law, including the recently-decided *Comcast* decision . . . and applicable FCC regulations relevant to this seminal jurisdictional question,” the CPUC agrees “with the Court in *Comcast* that the FCC’s reliance on Title I as a source of jurisdictional authority for broadband Internet service is not securely linked to an express delegation of regulatory authority.”²⁰ It remains the view of the CPUC that the continued reliance on Title I as a legal framework for broadband Internet service is not appropriate, especially given the significant limitations imposed the *Comcast* decision has imposed on the FCC.

C. Future Applicability of Title II

The alternative approach the Commission proposes would regulate “broadband Internet service” under Title II of the Communication Act of 1934, as amended by the 1996 Federal Telecommunications Act (“Act”).²¹ Under this option, which the Commission has referred to as a “third way,” the Commission would assert its jurisdiction over broadband Internet connectivity service, but forbear as a general matter

¹⁸ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

¹⁹ *Brand X*, *supra* .

²⁰ “See, CPUC Comments in GN No. 09-191, WC 07-52, at page 12 and 13.”

²¹ NOI, para. 2; see 47 U.S.C. §§ 201, *et seq.*

from rate regulation and a number of other regulatory requirements traditionally applied to common carriers.

In its recent comments on the *Open Internet Rulemaking*, the CPUC addressed this option, stating that “[i]f the [FCC] were to assert its jurisdiction under Title II, it should do so in a very limited manner, so as to ensure continued growth and development of both technology and content.”²² The CPUC then suggested that the FCC could forbear from imposing many aspects of traditional common carrier regulation on Internet access providers.²³ Section 160(a) of the Act expressly authorizes the Commission to forbear from “applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets” In order to exercise this forbearance authority, the FCC must make specified determinations as set forth in Sections 160(a)(1), (2), and (3) of the Act. The FCC has made such determinations on a number of occasions in other contexts and pertaining to other types of telecommunications services and service providers. The CPUC believes the Commission properly can make such a determination relative to broadband Internet access service providers.

The CPUC continues to adhere to its previously expressed position that the FCC may use its Title II authority to regulate broadband Internet access service, and if the FCC uses its Title II authority it should forbear from rate regulation and other aspects of

²² See, CPUC Comments in GN No. 09-191, WC 07-52, at page 13.

²³ OTE *id.*

that historical regulatory regime. The CPUC believes this approach is legally supportable and that it represents a sound policy choice.

The Plan's emphasis is on the benefits of national adoption of broadband, from innovation and entrepreneurship to health, education and the environment. Given the importance of these goals to the public interest, it is vital that the Commission must position itself on sound legal ground. Moreover, the Commission must explain in clear terms what is covered under this legal framework. The Commission also should clarify what role the states, both individually, and states working together with the Commission, will have in this scheme.

II. OVERARCHING ISSUES

A. Introduction

The FCC's NOI raises numerous legal and policy issues regarding what sections of the Act are necessary to accomplish the goals of the Commission and implement the National Broadband Plan. These overarching legal and policy questions are the following:

- 1) What should be the States' role in the regulatory scheme envisioned by the FCC?
- 2) What are the parts of the transport system that allow an end user to connect to the Internet; in other words, what does the FCC envision would be included in its definition of "broadband Internet connectivity service";
- 3) What sections of the Act should the FCC continue to enforce?

B. Role of the States

The CPUC addresses below the CPUC's current role and the necessity for an on-going role for the States, and what specific sections of Title II of the Act California believes the Commission should consider as it decides whether and to what extent to forbear from applying such provisions to broadband Internet Connectivity Service internet access service. We note, as a preliminary matter, that in Sections 254 and 706 of the Act, Congress recognized the critical role State commissions must play to facilitate the availability and adoption of affordable advanced telecommunications services. Section 706 specifies that States (and the FCC) "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Further, in Section 254, Congress specified that States have the authority to take reasonable steps to preserve and advance universal service,²⁴ a term defined as "taking into account advances in telecommunications and information technologies and services."²⁵

As a more general comment, while "cooperative federalism"²⁶ has been an important concept in refining and defining the working relationship between the federal

²⁴ 47 U.S.C. Section 254(i).

²⁵ 47 U.S.C. Sections 254 and 706.

²⁶ In 2005, the National Association of Regulatory Utility Commissioners ("NARUC") adopted a resolution that endorsed a report on *Federalism and Telecom*, by the NARUC Legislative Task Force, which expressed support for "a 'functional-focus' model of jurisdiction" that allocates "State and federal responsibility over telecommunications based on analysis of the characteristics of each governmental function exercised, and of the comparative abilities of different levels of government to exercise the function successfully. The adopted *Resolution* states:

and state governments, the States should share other areas of regulation with the FCC or retain still others because of the States' longstanding expertise in specific areas. Some good examples of this would be in enforcing compliance with consumer protection laws, public safety, and designation of entities eligible for universal service support.²⁷

C. Definition of Broadband Internet Connectivity Service

Given the complexity of the telecommunications system, the definition of the term “broadband Internet connectivity services” that emerges from this NOI will affect directly the manner in which the FCC and the States exercise jurisdiction over this service. The Commission describes this service as one that “allows users to communicate with others who have Internet connections, send and receive content, and run applications online.”²⁸ California asks the Commission to more clearly define the demarcation and interconnection points of “broadband Internet connectivity services.”

In crafting this definition, the Commission should take into consideration inevitable technological breakthroughs in both the short and long term. Further, the

Any new regulatory framework should allow the States to perform a strong consumer-focused role, and in particular ensure that States are able to: Provide a local venue for investigation, alternative dispute resolution and prompt and efficient resolution of both intercarrier disputes and consumer-to-company disputes; investigate adequately and take enforcement actions against violations of State laws regarding deceptive, misleading or fraudulent business practices, including slamming and cramming; maintain basic consumer protections such as the terms and conditions of service, contract disclosures, quality of service standards and reliable E911 services.

²⁷ When not acting pursuant to specific preemption provisions of the Communications Act, the proper legal test for FCC preemption of states requires both in severability and inconsistency with the statutory goals. *See, Louisiana v FCC*, 476 US 355 (1986).

²⁸ NOI, p. 1, Footnote 1.

FCC’s definition should focus on ensuring that consumers are able to connect to the Internet regardless of the technology employed for access.

In the NOI, the FCC stated that Voice over Internet Protocol (“VoIP”) is not within the scope of the proceeding. However, the answer to the question – what is broadband Internet connectivity service will directly affect how the FCC ultimately decides whether and, if so, how VoIP services should be regulated.

D. Forbearance - Specific Issues

The NOI raises many questions about how the Commission and the States will regulate telecommunications carriers in an IP-enabled world. The following points are not meant to be an exhaustive list of issues related to the various sections of the Act that need to be addressed; rather, this list addresses the most important of these issues that the CPUC has identified to date.

1. Section 254 – Universal Service; Section 255 – Disabilities²⁹

Currently § 254 (b)(2) of the Act requires the FCC to base policies for the preservation and advancement of universal service on the principle, among others, that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.”³⁰ As the CPUC has stated in numerous prior comments to the FCC, many States have their own universal service programs, and many of these

²⁹ Section 214(e) of the Act provides the framework for determining which carriers are eligible to participate in universal support programs, and Section 251(a) (2) of the Act directs telecommunications carriers not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 251(a) (2) and Section 225, which establishes the telecommunications relay service programs.

³⁰ 47 U.S.C. § 254(b)(2).

programs provide support for services beyond what the current federal universal service programs provide. For example, California has a Deaf and Disabled Telecommunications Program (DDTP).³¹ The DDTP provides both Telecommunications Relay Service – mandated by the FCC – and specialized equipment on a loan basis to qualified individuals – mandated by State but not Federal law – to enable access to the Public Switched Telephone Network (“PSTN”) for disabled persons.

If the Commission were to forbear from enforcing § 254, such forbearance conceivably would remove from State jurisdiction any authority to establish and/or continue existing state universal service programs to support broadband deployment or adoption. On the other hand, if the Commission and the States continue to have jurisdiction over Universal Service and disability programs that promote broadband deployment, then the Commission should acknowledge that both the FCC and the States have a role in determining the best method for universal service contributions from broadband internet connectivity services to the respective federal and State Universal Service Funds, and for ensuring collection of those contributions.

2. Consumer Protection -- State and Federal Roles

State commissions, like the CPUC, historically have had a strong role in establishing and enforcing consumer protection issues pertaining to the provision of traditional wireline service offered over the PSTN. In 1993, Congress also reserved to

³¹ The Deaf and Disabled Telecommunications Program was established by the Commission to comply with Cal. Pub. Util. Code §§ 2881-2881.2.

the States jurisdiction over the terms and conditions of wireless service.³² State consumer protection laws should apply to broadband internet connectivity services, because consumers are best served by having a venue within their respective States to register and resolve complaints. There is nothing unique or different about a broadband connection when compared to other services delivered to the home that are subject to State consumer protection laws, and the FCC should maintain the historical paradigm when dealing with broadband internet connectivity services.

While federal standards provide a useful complement to State actions, consumers should not have to wait for federal rulemakings every time a new technology poses new consumer protection issues. States often have been first to provide consumer relief when new problems have emerged, such as cramming or modem hijacking. States often have greater flexibility to stop bad practices when a company in question considered penalties alone merely the “cost of doing business.” It is vital that the States continue to have the flexibility to address novel issues in relation to broadband Internet connectivity services.

3. Privacy – Section 222

We support the Commission’s proposal not to grant forbearance from Section 222 of the Act. This section requires telecommunications carriers to protect the confidentiality of customer information obtained by virtue of the carrier’s provision of a telecommunications service. Section 222 and related FCC regulations mandate how the carrier may use, disclose, and permit access to customer proprietary information, to ensure that the carrier may utilize the information as necessary to provide service but at the same time ensure maximum privacy protection of the customer’s information.

³² See, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993.

4. Sections 201 and 202

The FCC is correct that §§ 201 and 202³³ are important tools for the FCC to use to provide the FCC with direct statutory authority to protect consumers and promote fair play. Section 201 prohibits unjust and unreasonable charges, while § 202 prohibits unreasonable discrimination. Since the FCC suggests that the “Third Way” is modeled on the current regulatory scheme for the wireless industry, we note here that the FCC expressly rejected the wireless industry’s forbearance request with regard to §§ 201 and 202. Rather, the FCC “found that in a competitive market those provisions are critical to protecting consumers.”³⁴

5. Sections 208

In paragraphs 77 and 78 of the NOI, the FCC seeks comment on whether or not it should forbear from Section 208 of the Act and the associated enforcement regime, Sections 206 (carrier liability for damages), 207 (recovery of damages and forum election), and 209 (damages award). These sections deal with the FCC’s authority to hear complaints and impose fines. Because these sections serve as an important tool for the FCC to use as it battles against unlawful practices, these sections should be retained as part of FCC active oversight over broadband Internet service.

6. Section 251 – Interconnection

In comments in the FCC’s *IP Network* proceeding, the CPUC stated that “the entrance of IP-enabled voice and data providers into the communications market implicates many issues pertaining to interconnection. Changes to the current

³³ 47 U.S.C. §§ 201-202.

³⁴ *Personal Communication Industry Association Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Service, Memorandum Opinion and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16865, ¶ 15.

interconnection rules are necessary to ensure continued interconnection and a level playing field among all facilities-based providers.”³⁵

The Commission should also be cautious about forbearing in a manner that would negatively affect the ability to mediate, arbitrate, resolve, and/or approve interconnection agreements.³⁶

In addition, forbearance from the numbering provisions of § 251(e) could likewise hamper the Commission’s ability to address numbering issues (and scams) in the converged marketplace. For example, should the FCC forbear from applying its exclusive number jurisdiction to broadband Internet service providers, nothing would then prohibit such a provider from establishing a unique number, not consistent with the North American Numbering Plan, as the means of contact for a particular service offering.

Even if FCC could forbear from enforcing § 251 solely as to “broadband Internet connectivity service,” or to any of the similar formulations in the NOI, the Commission still would have to define precisely what that service is, and distinguish it from traditional POTS that may use predominantly the same facilities.

³⁵ See, *In the Matter of Comment Sought on Transition from Circuit-Switched Network to all-IP Network* – NBP Public Notice #25, GN Docket Nos. 09-47, 09-51, 09-137, CPUC’s December 18, 2009 Comments, at pages 4-5.

³⁶ We note that some existing interconnection agreements include IP-based services. The Commission should not create new arbitrage opportunities that will inappropriately shift costs based on the classification of the traffic by a provider. Further, the Commission should clarify the role it will play and any role it expects States to play in addressing inevitable disputes between providers.

7. Numbering Administration

Presently, pursuant to the Act, the FCC has delegated authority to the States to implement new area codes and to assist in monitoring industry use of numbering resources. The NOI raises some important questions about the status quo with regard to numbering resources, as among them the following: Should a different numbering plan apply to broadband internet connectivity services? If so, should States have a role in administering that number plan, comparable to or different from the role they have in managing the NANPA? Can the States have such a role if they have no enforcement powers? Moreover, if the States are preempted from exercising jurisdiction over broadband internet connectivity services, should States retain authority to implement new area codes and monitor use of numbering resources? What rules and processes would the FCC need to establish to exercise the traditional State enforcement powers over carriers regarding their number use?

We note that a decade ago, when the FCC opened its Numbering Resources Optimization docket,³⁷ the FCC envisioned a role for the States in implementing new area codes. The Commission and the States engaged in an active partnership to develop, implement, and enforce numbering utilization and reporting rules. Implementation of new area codes has remained almost exclusively a State function, with oversight from the FCC. While this construct is not universally applicable, it provides an instructive

³⁷ *In the Matter of Numbering Resource Optimization*, CC Docket No. 99-200, Released: June 2, 1999.

example of both a public policy success story, and a sharing of responsibility by and between the States and the Commission.

8. Emergency Services

The Commission and the States also share responsibility in the area of emergency services. The Commission has recently issued a Public Notice on the applicability of FCC rules regarding outages to broadband Internet Service Providers and VoIP providers.³⁸ In that proceeding, the Commission should address how emergency services oversight and enforcement of compliance with federal rules will be effectuated in an IP-based telecommunications system. The following are specific issues of concern to the CPUC.

a) Loss of Separately Powered PSTN Communications Network

In its *IP Network* comments, the CPUC also raised a concern regarding the transition to an IP-based world – specifically that the loss of a separately-powered communications system could impede a customer’s access to emergency services.

Below are some of the issues the CPUC raised in that proceeding:

Should there be a requirement that IP-voice providers provide back-up power at the customer premises? How would such a requirement be enforced? Alternatively, would education of customers be adequate to address this issue? Who should be

³⁸ Public Notice, *Public Safety and Homeland Security Bureau Seeks Comment on Whether the Commission’s Rules Concerning Disruptions to Communications Should Apply to Broadband Internet Service Providers and Interconnected Voice over Internet Protocol Service Providers*, ET Docket 04-35; WC Docket 05-271; GN Dockets 09-47, 09-51, 09-137. The Notice seeks comments and information “on a variety of issues related to whether, and if so how, the Commission should expand its Part 4 rules so that they also apply to interconnected VoIP service providers and broadband ISPs.” Public Notice at 2.

required to educate the customer? Should the states be allowed to require back-up power if there is no federal mandate, and be allowed to set the duration for back-up power to meet each State's individual, unique circumstances? Should there also be comparable back-up power requirements on the facility provider side -- so that not only the end-user customer is assured of back-up power but so too the service and application providers using the foundational broadband facility?³⁹

Clearly, the Commission and the States must address these important questions.

Thus, the Commission should forbear from any sections of the Act pertaining to emergency services in connection with broadband Internet connectivity service.

b) E-911

In its *IP Network* comments, the CPUC stated that “[t]he California designated entity to implement 9-1-1 has a central role in ensuring that all residents have reliable and free access to 911. Currently, the California PUC has jurisdiction to regulate rates of 9-1-1 data base intrastate access services.”⁴⁰ If the FCC forbears from applying E-9-1-1 requirements to broadband internet connectivity service, state jurisdiction over E-9-1-1 access rates and terms would be pre-empted. A number of troublesome questions would then arise.

For example, who should establish and enforce E 9-1-1 reliability standards for broadband Internet Connectivity service providers?⁴¹ Should the States continue to have

³⁹ See, *In the Matter of Comment Sought on Transition from Circuit-Switched Network to all-IP Network* – NBP Public Notice #25, GN Docket Nos. 09-47, 09-51, 09-137, CPUC’s December 18, 2009 Comments, at pages 9-10.

⁴⁰ *Id.*

⁴¹ Certainly, broadband Internet connectivity service is not the same type of service as traditional POTS, or even VoIP. Still, if the broadband Internet connectivity service is not properly provisioned, the VoIP provider using

the authority to require tariffs and establish rate levels for the transport, switching and delivery of E9-1-1 voice and data to the Public Switched Answering Points in an all-IP-based world? And, in the event that States do not have jurisdiction over internet broadband connectivity service or its providers, should States continue to regulate the rates, access and use of 9-1-1 data bases that contain confidential, unpublished information?

Given the vital importance of emergency services, the Commission should not forbear from regulation in this area in connection with broadband Internet service.

9. Service Quality

Service quality and consumer protection are obviously important matters for customers of communications providers. Currently, States have jurisdiction over the quality of voice service provided by LECs, as well as over the terms and conditions of wireless service. Given the FCC vision that the “Third Way” would be similar to the current regulation of wireless service, it is important that the FCC and the States both continue to retain authority over terms and conditions of service for broadband Internet connectivity service. This, too, is an area where the FCC should not forbear.

10. Small Carriers

The CPUC is concerned that consumers in rural areas not be left behind by being subject to a lower speed standard for Internet connection. The CPUC urges the FCC to consider carefully, and to weigh the potentially negative consequences, of creating a two-

that service may be unable to offer its customers effective E-9-1-1 service.

tier system for broadband Internet access service speeds. If the U.S. is to be globally competitive, then all Americans should have access to broadband Internet access service that will enable them to connect in a quick timeframe to the rest of the network.

III. CODE PROVISIONS THAT THE FCC DOES NOT HAVE AUTHORITY TO FORBEAR FROM BECAUSE THEY DO NOT DIRECTLY IMPOSE OBLIGATIONS ON CARRIERS OR SERVICES.

The NOI mentions two sections of the Act in reference to code sections that the forbearance statute might not cover. Those are § 253 (State Preemption) and § 224 (Regulation of Pole Attachments). Since § 160 relates only to carriers and services,⁴² the Commission cannot forbear from other provisions of the Act that specifically address non-carrier and non-service matters.

IV. LEGAL AND EVIDENTIARY RECORD

Given the importance and urgency of the need to implement the Plan, it is important that the FCC build a complete legal and evidentiary record to confirm the agency's oversight authority. The FCC's proposal to invoke Title II, described by the Chairman as the "Third Way," appears to offer a surer path for the FCC to resolve jurisdictional authority, and would allow the FCC and State regulators to move forward more quickly to effectuate the Plan.

If the Commission concludes, accordingly, that it must reclassify broadband Internet connectivity service under Title II, it will be critical that the FCC explain in

⁴² . . . the Commission shall forbear from applying any regulation or any provision of this ACT to a telecommunications carrier or telecommunications service...

detail the basis for such a regulatory transition, especially given that many of the arguments being made today were made in 2002 in the *Cable Modem Declaratory Ruling* proceeding and in 2005 in *Brand X*. In this regard, therefore, the CPUC cautions the FCC to support its proposed jurisdictional move with evidence that a modified policy is needed as a result of fast and ubiquitous changes that have occurred, and continue to occur, in the greater broadband marketplace.

For example, in 2002, when the FCC determined in its *Cable Modem Declaratory Ruling* that broadband Internet service should be categorized as an information service, it did so premised on the assumption that competition for broadband services would increase significantly in the years ahead.⁴³ Yet, eight years later, in 2010, the broadband market still is still dominated by those carriers controlling the local loop to almost all current and potential broadband customers, as information in the proposed Plan shows.

In most parts of the country, broadband service is provided by the incumbent LECs and/or the relevant cable operator. While it is true that more competition exists for wireless broadband Internet access,⁴⁴ the speeds and data volume delivery of wireless broadband access *today* may not match those of wireline broadband Internet access service. The charts and accompanying data in the proposed Plan are examples of the

⁴³ 17 FCC Rcd at 4804, (2002), ¶ 10.

⁴⁴ See NBP Exhibits 4-A (wireless). The NBP is cautious regarding wireless vs. wireline competition and notes that two of the nationwide “wireless providers” are also leading providers of wireline broadband...”NBP at 40. The NBP goes on to note the “Wireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers.” The NBP then adds a qualification: “The ongoing upgrade of the wireless infrastructure is promising because of its potential to be a closer competitor to wireline broadband especially at lower speeds.” NBP at 42.

types of evidence the FCC would need to develop and use to support any shift to a Title II classification for broadband Internet connectivity service. Alternatively, if the data cannot be developed, then the Commission must rethink its Title II approach.

V. CONCLUSION

The CPUC appreciates the opportunity to comment on this very important matter. These issues are obviously of utmost importance to the CPUC and to the consumers in California. We look forward to continuing to work with the FCC as partners in fashioning the appropriate legal and regulatory structure to guide the transition to an all IP-enabled communications future. Together we can ensure that the new paradigm facilitates the transition, encourages competition, promotes service quality, ensures strong enforcement of necessary regulations, and provides the consumer with the knowledge and tools essential to navigate in this new world.

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